

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

James A. Conrad

v.

New Hampshire Department of Safety, *et al.*

No. 09-CV-550

ORDER

The plaintiff, James Conrad, brought suit against the defendants, the New Hampshire Department of Safety ("NHDS") and Captain Mark Myrdek, alleging that they unlawfully detained him at state police headquarters. The court held a trial on two counts: false imprisonment (Count I) (against NHDS and Captain Myrdek); and violation of 42 U.S.C. § 1983 (Count VI) (against Captain Myrdek). At the close of the plaintiff's case-in-chief, the defendants moved for a directed verdict on both counts. The plaintiff objected. The court took the matter under advisement. Because NHDS is entitled to sovereign immunity and because Captain Myrdek is entitled to official and qualified immunity, the defendants' motion for a directed verdict is GRANTED.

A party is entitled to a directed verdict if the court finds that "no rational juror could conclude that the non-moving party is entitled to relief." *Clark & Lavey Benefits, Inc. v. Ed. Dev. Center, Inc.*, 157 N.H. 220, 226 (2008). When ruling on the motion, the court must view all evidence in the light most favorable to the non-moving party. *Id.* The court may not "weigh the evidence or judge the credibility of the witnesses and should deny the motion ... unless it can affirmatively determine that the plaintiff is not entitled to any relief on the evidence presented." *Id.* The issue is not as clear when the resolution of disputed facts is necessary to a legal determina-

tion of immunity. While the federal courts generally reserve disputed immunity facts to the jury, some state courts designate the judge as the fact finder. *Compare Wilson v. City of Boston*, 421 F.3d 45, 53 (1st Cir. 2005) (jury resolves genuinely disputed material facts necessary to adjudicate claim of immunity), *with Truman v. Griese*, 762 N.W.2d 75, 84-85 (S.D. 2009) (the court resolves genuinely disputed issues of material fact necessary to make a sovereign immunity determination). The court need not resolve this issue here, however, because the plaintiff cannot prevail on the immunity issue on the evidence presented. Thus, the court will apply the directed verdict standard by basing its analysis on the trial record viewed in the light most favorable to the plaintiff.

The incident underlying this action took place in November of 2007. The plaintiff had been employed as a state trooper with the NHDS for approximately 20 years. At the time of the incident, the plaintiff and his wife, Laura Conrad, were estranged. Ms. Conrad had recently filed a divorce petition. The plaintiff was having a "difficult time" dealing with the separation and the impending divorce. Ms. Conrad contacted the plaintiff's supervisor, Captain Russell Conte, to report her concern for the plaintiff's well being.

The family court issued a protective order in the divorce proceeding prohibiting the plaintiff from entering Ms. Conrad's home. On November 26, 2007, the Laconia police department contacted Captain Conte to report that Ms. Conrad requested additional patrols by her home due to her belief that the plaintiff violated the protective order by entering her home. On November 27, 2007, Ms. Conrad contacted Captain Conte to tell him about an argument she had with the plaintiff two days earlier, wherein the plaintiff told Ms. Conrad that he would be "going to hell" for what he was "about to do." Ms. Conrad informed Captain Conte that the plaintiff entered her home.

On November 28, 2007, the plaintiff arrived at work and asked Pam Dawson, a secretary in his office, whether he had received any telephone calls. Ms. Dawson told the plaintiff that Ms. Conrad called to speak with Captain Conte. The plaintiff became angry and called Ms. Conrad a "fucking bitch." Shortly thereafter, the plaintiff's supervisors, Captain Conte and Captain Myrdek, called the plaintiff into Captain Myrdek's office. The two captains informed the plaintiff that they intended to interview him regarding the alleged protective order violation. They also informed him of his rights under *Garrity v. New Jersey*, 385 U.S. 493 (1967). "Such a warning informs the accused that the purpose of questioning is to assist in determining whether to impose administrative discipline." *Appeal of Waterman*, 154 N.H. 437, 442 (2006). Following this discussion, the plaintiff returned to his office and contacted his union representative, Christopher LaPorte.

At approximately 2:20 PM, the plaintiff spoke with Mr. LaPorte, who told him that he would be unable to come to headquarters that day. Mr. LaPorte suggested to the plaintiff that he contact Attorney Jim Donchess. At 2:30 PM, the plaintiff returned to Captain Myrdek's office to relay Mr. LaPorte's message. Captain Myrdek instructed the plaintiff to have Mr. LaPorte contact Captain Myrdek directly. The plaintiff complied. Mr. LaPorte contacted the captain and told him that it "might be a good idea" to have Attorney Donchess present for the interview. This information agitated Captain Myrdek.

Following the conversation, the plaintiff returned to his own office, where he began drafting a resignation letter. The resignation letter specified a future "effective date" of November 30, 2007. After completing his resignation letter, the plaintiff received a telephone call from Mr. LaPorte informing him that Attorney Donchess was unavailable that day. Mr. LaPorte told the plaintiff to postpone the interview and to schedule it for "Thursday or Friday."

Between 2:45 and 3:00 PM, the plaintiff entered the "operation's office" and spoke to Captain Myrdek. The plaintiff informed the captain that the interview could not take place that day in the absence of either a union representative or an attorney. The plaintiff stated that he would not speak to Captain Myrdek unless Attorney Donchess was present. Captain Myrdek and the plaintiff returned to Captain Myrdek's office. Captain Myrdek instructed the plaintiff to close the door.

Once in the office, Captain Myrdek told the plaintiff that the interview was going to happen that day and that it "could not wait." The plaintiff again informed Captain Myrdek that he would not proceed with the interview without Attorney Donchess. At that point, both the plaintiff's and Captain Myrdek's "voices started to go up." The plaintiff then handed his resignation letter to Captain Myrdek and said, "I quit." Captain Myrdek responded that he would not accept the plaintiff's resignation. The plaintiff then shouted, "Fuck you and fuck the Colonel." Captain Myrdek asked the plaintiff to calm down. The plaintiff told Captain Myrdek that he was leaving.

As the plaintiff stood to leave, Captain Myrdek stood between the plaintiff and the door. Immediately, the plaintiff reached around Captain Myrdek and opened the door. Captain Myrdek stepped back and away from the door. The plaintiff went through the door and into the hallway. Captain Myrdek caught up with the plaintiff and stepped in front of him, but the plaintiff once again moved around the captain.

The plaintiff stepped through the doorway into the "common area," during which time the plaintiff and Captain Myrdek were "exchanging words." Captain Myrdek caught up with the plaintiff. The plaintiff moved around Captain Myrdek. Captain Myrdek asked the plaintiff to come back to his office so that they could talk. The plaintiff became angry and frustrated. The plaintiff then asked why everyone was "taking Laura's side." The plaintiff also referred to Ms.

Conrad as a "cunt." The plaintiff then walked toward the door leading out of the common area. The plaintiff punched the door hard with his fist. In response, several officers, including Captain Myrdek, tackled the plaintiff to the ground.

The plaintiff did not physically resist the officers, although he did verbally challenge them to "shoot" or "tase" him while he was on the ground. The officers brought the plaintiff back to Captain Myrdek's office. They then removed the plaintiff's weapon, closed the office door and blocked it. For the next two hours, the plaintiff remained in Captain Myrdek's office. At times, officers stayed in the room and spoke with the plaintiff. At other times, the plaintiff sat alone. During that period, the officers attempted to contact their supervisor, Colonel Frederick Booth, and notify him of the situation. The officers were not able to connect with Colonel Booth until approximately 4:00 PM because the colonel was in a meeting.

At 4:20 PM, Colonel Booth arrived at state police headquarters and spoke with Major Sue Forey. Major Forey told the colonel what had occurred. Following their discussion, Major Forey and Colonel Booth met with NHDS Commissioner John Barthelmes at approximately 4:40 PM. Commissioner Barthelmes determined that, due to the internal nature of the investigation, the NHDS should request assistance from an independent law enforcement agency. At 5:09 PM, Major Sue Forey contacted and requested the assistance of the Concord police department.

At approximately 5:30 PM, Concord police officers Renee Boyd, William Brouillet, and Miguel Cebollero responded to state police headquarters. The Concord officers went to Captain Myrdek's office and found the plaintiff extremely upset. The plaintiff made statements and motions as though he planned to jump out of a window. The plaintiff also threatened to take Officer Cebollero's weapon in an attempt to commit "suicide by cop."¹ The Concord officers transported

¹ "Suicide by cop" occurs when a person takes an action with the purpose to force a law enforcement official to use deadly force against him.

the plaintiff to the Concord Hospital for evaluation under the “involuntary emergency admittance” statute. *See* RSA 135-C:27, 28.

The following day, the Concord police department charged the plaintiff with four crimes: (1) violation of a protective order, contrary to RSA 173-B:9; (2) criminal threatening, contrary to RSA 631:4; (3) disorderly conduct, contrary to RSA 644:2; and (4) resisting arrest, contrary to RSA 642:2. Subsequently, the plaintiff asked the district court to suppress all of the evidence in his criminal trial, arguing that Captain Myrdek and other officers violated his Fourth Amendment rights when they tackled and restrained him at police headquarters. The district court denied the plaintiff’s motion, finding that the officers acted reasonably in detaining the plaintiff because of his “emotional state” and “the potential need for protective custody.” After a bench trial, the district court entered verdicts of not guilty on all charges. The instant action followed.

As indicated above, the defendants moved for a directed verdict at the close of the plaintiff’s case-in-chief. The plaintiff objected. The court took the matter under advisement, deferring a ruling on the motion until after trial. Following the close of the defendants’ case, the jury deliberated on the plaintiff’s Count I false imprisonment claim. Because the plaintiff was not entitled to a jury on his Count VI § 1983 claim, the court reserved Count VI for its own consideration. On May 18, 2012, the jury returned a verdict for the plaintiff on Count I, awarding him \$1.5 million in damages.²

The defendants argue that they are entitled to a directed verdict because they are immune from suit. Specifically, NHDS argues that it is entitled to sovereign immunity on Count I. Cap-

² The immunity issue is dispositive. If that were not the case, the defendants would nevertheless be entitled to remittitur. *See* RSA 541-B:14 (“All claims arising out of any single incident against any agency for damages in tort actions shall be limited to an award not to exceed \$475,000 per claimant....”); *see also Laramie v. Stone*, 160 N.H. 419, 437 (2010).

³ Indeed, the foregoing facts would support a determination of immunity even if the evidence supported a finding that the plaintiff was confined at an earlier time—for example, if the plaintiff

tain Myrdek argues that he is entitled to official immunity with respect to Count I and qualified immunity with respect to Count VI. The court will first address the issue of the defendants' entitlement to immunity on the plaintiff's Count I claim of false imprisonment.

"False imprisonment is the unlawful restraint of an individual's personal freedom." *MacKenzie v. Linehan*, 158 N.H. 476, 482 (2009). To prove false imprisonment, the plaintiff must show: (1) the defendant intended to confine the plaintiff within boundaries fixed by the defendant; (2) the defendant's act directly or indirectly resulted in the confinement; (3) the plaintiff was conscious of or harmed by the confinement; and (4) the defendant acted without legal authority. *See id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 35 (1965).

The defendants' motion does not attack the plaintiff's ability to satisfy the elements of a false imprisonment claim; indeed, at this point they cannot do so because the jury has found that the plaintiff met his burden of proving the elements of false imprisonment. Thus, the court will confine its analysis to the issue presented by the defendants in their motion—whether they are entitled to immunity. NHDS argues that it is entitled to sovereign immunity under RSA 541-B:19. Captain Myrdek argues that he is entitled to official immunity. After reviewing the factual record and the applicable law, the court agrees with the defendants.

"Sovereign immunity protects the [s]tate itself 'from suit in its own courts without its consent,' and shields it 'from liability for torts committed by its officers and employees.'" *Everitt v. General Electric Company*, 156 N.H. 202, 209 (2007), quoting *Tilton v. Dougherty*, 126 N.H. 294, 297 (1985). In RSA 99-D:1, New Hampshire adopted sovereign immunity by statute, but it has waived it under certain circumstances. *See* RSA 507-B:2; *see also* RSA 541-B. In particular, RSA 541-B:1, II-a (a) waives the state's immunity for:

Bodily injury, personal injury, death or property damages caused by the failure of the state or state officers, trustees, officials, employees, or members of the general

court to follow the appropriate standard of care when that duty was owed to the person making the claim, including any right of action for money damages which either expressly or by implication arises from any law, unless another remedy for such claim is expressly provided by law.

Just as the state may waive its immunity, it may also preserve certain portions of that immunity. It has preserved its immunity under RSA 541-B:19, (d), which protects the state and its agencies against:

Any claim arising out of an intentional tort, including ... false imprisonment, ... provided that the employee whose conduct gives rise to the claim reasonably believes, at the time of the acts or omissions complained of, that his conduct was lawful, and provided further that the acts complained of were within the scope of official duties of the employee for the state.

Thus, in order to succeed on a claim of false imprisonment against the state, the plaintiff must "prove that the offending state employee not only lacked a reasonable belief in the lawfulness of his conduct, but also acted within the scope of his employment." *Opinion of the Justices*, 126 N.H. 554, 565 (1985). "Establishing both of these elements in most instances should prove a difficult task." *Id.* If a plaintiff can satisfy both elements, however, imposing liability on the state is the only just course. *Id.*

The court will first address the issue of whether the officers or employees acted within the scope of their duties. This question requires an analysis of the officers' respective duties. See *Hughes v. Div. of Aeronautics*, 152 N.H. 30, 38-39 (2005). The duties of a police officer are inherently broad. Beyond question, an officer's duties include protecting the public's safety and enforcing laws. Furthermore, when acting in an administrative role, an officer's duties can include functions typical of a normal employment setting, including the duty to investigate alleged misconduct.

Here, the NHDS officers acted within the scope of their duties. First, Captain Conte and Captain Myrdek acted in their capacity as employers. The captains were the plaintiff's supervi-

sors and the incident commenced with the officers' attempt to initiate an internal investigation into the plaintiff's allegedly unlawful conduct. Additionally, the officers provided the plaintiff with a *Garrity* warning and contacted a union representative, Mr. LaPorte. Second, the NHDS officers acted within their law enforcement capacities. Captain Conte received information not only from the Laconia police department, but also from Ms. Conrad that the plaintiff violated a protective order, which is a Class A Misdemeanor under RSA 173-B:9, III. The officers knew the plaintiff was having a "difficult time" with Ms. Conrad's decision to file for divorce. As a result, the officers were concerned for the safety of both Ms. Conrad and the plaintiff. Because the officers acted in their capacities as employers and law enforcement personnel, they acted "within the scope of their duties" under RSA 541-B:19, (d).

The court will now address the remaining RSA 541-B:19, (d) immunity prong—whether the officers reasonably believed that their conduct was lawful. Whether conduct is reasonable is an objective determination and depends upon the facts of each case. *See Hughes*, 152 N.H. at 38-39. In this case, this inquiry also requires a determination of the precise moment when the officers' conduct became unlawful. Here, the facts viewed in the light most favorable to the plaintiff can only support a finding that the officers' conduct became unlawful when they tackled the plaintiff and not before. "[A] plaintiff in a false imprisonment action must reasonably believe that he or she has been detained." 32 AM. JUR. 2D FALSE IMPRISONMENT § 12 (1995). The plaintiff must also prove that he submitted to the confinement. *Id.* It is not enough that the plaintiff suffered a slight inconvenience. RESTATEMENT (SECOND) OF TORTS, § 36, comment (a).

The plaintiff did not submit to any confinement until the NHDS officers tackled him to the ground. The plaintiff testified that when Captain Myrdek stood between him and the door, he reached around Captain Myrdek, opened the door, and left. This action does not support the ele-

ment of confinement. *See* 32 AM. JUR. 2D FALSE IMPRISONMENT, § 12 (1995). The plaintiff was also not confined when Captain Myrdek stood in front of him in the hallway. Confinement must be complete. *Id.* Though Captain Myrdek's actions may have represented a slight inconvenience, the plaintiff was not confined.

The question thus becomes whether the officers reasonably believed, when they tackled the plaintiff to the ground and thereafter, that their conduct was lawful. This inquiry does not focus on whether the officers' conduct was actually lawful—to do so would improperly commingle the analysis applicable to immunity and liability. Under an immunity analysis, it is possible for an officer to act both reasonably and unlawfully. *Anderson v. Creighton*, 483 U.S. 635, 643 (1987). Here, an objective analysis compels a finding that the NHDS officers had a reasonable basis to believe that their conduct was lawful.

First, the officers could have reasonably believed that they were acting lawfully pursuant to the involuntary emergency admission statute. RSA 135-C:27 provides:

When a peace officer observes a person engaging in behavior which gives the peace officer reasonable suspicion to believe that the person may be suffering from a mental illness and probable cause to believe that unless the person is placed in protective custody the person poses an immediate danger of bodily injury to himself or others, the police officer may place the person in protective custody.

The officers knew that the plaintiff was having an extremely difficult time with the divorce. The plaintiff used highly inappropriate language throughout the interview process, most of which was directed toward his wife. Furthermore, the plaintiff became extremely upset and punched a door hard before he left the common area. It is not necessary that the plaintiff's conduct satisfied all of the elements required for involuntary emergency admission, only that the officers reasonably believed that protective custody was lawful. *See, e.g., S.P. v. City of Takoma Park*, 134 F.3d 260, 267-68 (4th Cir. 1998).

Second, the officers could have reasonably believed that the plaintiff violated a protective order under RSA 173-B:9, III. Captain Conte and Captain Myrdek received information from the Laconia police department and from Ms. Conrad that the plaintiff violated a protective order by entering Ms. Conrad's home. The officers also had information that the plaintiff told his wife he would "go to hell" for what he "was about to do." The court recognizes that the plaintiff offered an alternative interpretation of his language at trial; however, the plaintiff never gave the officers the opportunity to consider his alternative interpretation on the day in question. When asked about the allegations, the plaintiff became upset and evasive. Importantly, whether the officers had probable cause is irrelevant to the reasonableness determination. The question is whether "it is reasonably arguable that there was probable cause for arrest—that is, whether reasonable officers could disagree as to the legality of the arrest such that the arresting officer is entitled to ... immunity." *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1076 (9th Cir. 2011). Here, it is reasonably arguable that there was probable cause to detain the plaintiff based upon safety considerations.³

The officers also believed that they were justified in continuing to detain the plaintiff at state police headquarters. After the officers tackled the plaintiff, he challenged them to "shoot" or "tase" him, and continued to grow increasingly upset. While making these statements, the plaintiff possessed a firearm. Furthermore, the officers acted reasonably in contacting their superiors. Over a two-hour period, the officers contacted Colonel Booth, who then contacted Commissioner Barthelmes. Commissioner Barthelmes determined that he needed an independent

³ Indeed, the foregoing facts would support a determination of immunity even if the evidence supported a finding that the plaintiff was confined at an earlier time—for example, if the plaintiff had submitted to the confinement when Captain Myrdek stepped in front of him in his office. Even then, Captain Myrdek had the sufficient information to support a reasonable safety concern even in the absence of the plaintiff's physical outburst of punching the door. Thus, the court would reach the same conclusion in both cases.

agency to assess the situation. Major Forey contacted the Concord police department. There is no evidence that any participant failed to treat the matter with the appropriate priority. Under the circumstances, the two-hour period to allow the officers to deliberate and come to a referral decision was not unreasonable.

Finally, the plaintiff's actions during the period after the Concord police arrived justified the remaining detention. The plaintiff threatened to take Officer Cebollero's weapon and "commit suicide by cop." The plaintiff also threatened to jump out of a window. Based on these statements, the officers could reasonably believe that they were justified in detaining the plaintiff under RSA 135-C.

The plaintiff argues that the officers acted unreasonably because they failed to take the plaintiff "directly" to the hospital as required under RSA 135-C:28. RSA 135-C:28, III provides, in pertinent part, "Any person taken into protective custody under this paragraph shall be transported directly to an emergency room ... for the purpose of determining if an involuntary emergency admission shall be ordered...." The plaintiff maintains that a reasonable officer would have understood that any delay violates the statute. The court disagrees. The plaintiff's interpretation is far too narrow. If the court construed the statute as the plaintiff suggests, an officer would violate the statute if he took a wrong turn on the way to the hospital or if he hesitated, even for a moment, before transporting a person to the hospital. This interpretation creates an absurdity and, therefore, is unpersuasive. *See State v. Kay*, 115 N.H. 696, 698 (1975) (the court does not interpret statutes to lead to absurd results).

Other portions of RSA 135-C:28 provide grounds for a reasonable officer to believe that the statute allows more discretion. The statute provides that "[t]he period of protective custody shall end when a physician or A.R.N.P. makes a determination as to whether involuntary emer-

gency admission shall be ordered or at the end of 6 hours, whichever event occurs first." RSA 135-C:28, III. Thus, although an officer should attempt to take a person directly to the hospital, protective custody may extend for six hours. Here, the officers detained the plaintiff for approximately two and one half hours before transporting him to the hospital. This is well within the six-hour time period. Thus, their actions were reasonable.

Subsequent judicial review also confirms the officers' reasonable beliefs. The district court denied the plaintiff's motion to suppress and held that the officers acted reasonably in detaining the plaintiff because of his emotional state and the potential need for protective custody. As a result, the court concludes that the NHDS officers had a reasonable basis to believe that their conduct was lawful.

The plaintiff argues that the state is not entitled to sovereign immunity because the NHDS officers knew that they had no authority to confine or seize their own employees. Specifically, the plaintiff asserts that the mere fact of employment does not give the employer the right to detain an employee. *See MacKenzie*, 158 N.H. at 476. This proposition of law is true, but unhelpful to the court's analysis for two reasons. First, the court in *MacKenzie* analyzed the **merits** of the plaintiff's false imprisonment claim; it did not consider whether the defendant was entitled to **immunity** under a "reasonable belief" standard. Second, the officers in the present case did not reasonably believe that they could detain the plaintiff based on his status as an employee; rather, they were reasonably concerned about the safety of the plaintiff and others based on the plaintiff's manifest behavior. The defendants in *MacKenzie* did not face similar safety concerns. Consequently, *MacKenzie* does not avail the plaintiff.

In sum, it is not necessarily any one of the plaintiff's actions that cloaks the state in immunity under the present circumstances. The immunity stems from all of the circumstances

known to the officers and the inherent tension that exists between carrying out the duties of an employer, while at the same time, acting in a law enforcement capacity. Because the NHDS officers acted within the scope of their duties and with a reasonable belief that their conduct was lawful, it is entitled to sovereign immunity.

The court now considers whether Captain Myrdek is entitled to official immunity. Sovereign immunity does not protect state employees; rather, under certain circumstances, state employees are protected by the doctrine of "official immunity." Historically, the state has recognized two types of official immunity. Under the first theory of official immunity, a state employee "sued in his official capacity [is] treated as identical with the state itself for the purposes of immunity." *Tilton*, 126 N.H. at 298. Official immunity in this sense is "literally derivative of sovereign immunity and coextensive with it." *Id.* This theory is only applicable when an injured party sues a state employee in his "official" capacity. *Id.* This theory is inapplicable under the present circumstances because the plaintiff sued Captain Myrdek in his "individual" capacity. See Plaintiff's Second Amended Complaint, at 2. The second theory of official immunity protects state employees sued in their "individual" capacities. This theory, at least at common law, did not rest upon the same considerations as sovereign immunity. *Tilton*, 126 N.H. at 298. Despite the differences at common law, however, courts apply the same test under either theory because the state has since adopted both theories under RSA 99-D:1. See *Everitt*, 156 N.H. at 209 (RSA 99-D:1 applies to employees in their "individual" capacities). Under either theory, an employee is immune so long as he acts within the scope of his employment and not in a wanton and reckless manner. RSA 99-D:1; see also *Everitt*, 156 N.H. at 209.

Here, Captain Myrdek is entitled to official immunity. First, as discussed above, the court has determined that Captain Myrdek, in conjunction with his fellow officers, acted in his capaci-

ty as an employer and a law enforcement officer; therefore, he acted within the scope of his employment. Second, Captain Myrdek did not act in a wanton and reckless manner. The court has already determined that Captain Myrdek had a reasonable basis to believe that his conduct was lawful; thus, the conduct cannot be wanton or reckless. *See Mlodzinski v. Lewis*, 648 F.3d 24, 39-40 (1st Cir. 2011).

Because the defendants are entitled to immunity on Count I of the plaintiff's writ, they are likewise entitled to a directed verdict.

Captain Myrdek also moved for a directed verdict on Count VI of the plaintiff's writ, which alleged violations of 42 U.S.C. § 1983. In that count, the plaintiff sued Captain Myrdek in his individual capacity. Because the plaintiff is not entitled to a jury trial on his § 1983 action, *see Hair Excitement, Inc. v. L'Oreal U.S.A., Inc.*, 158 N.H. 363, 368 (2009), the court reserved the question for its own consideration. Nevertheless, the court need not reach the merits of the § 1983 action because the issue of whether Captain Myrdek is entitled to qualified immunity is dispositive.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

The plaintiff's writ alleges that Captain Myrdek violated his Fourth Amendment right to be free from unreasonable searches and seizures in that Captain Myrdek intentionally or recklessly restrained the plaintiff, without probable cause, for several hours. *See Plaintiff's Second Amended Complaint*, at 23-24. Courts recognize that establishing the elements of false imprisonment will

generally constitute a violation of § 1983. *See, e.g., Groman v. Township of Manalapan*, 47 F.3d 628, 636 (3d Cir. 1995).

An official may defend against a § 1983 action under a qualified immunity theory. *See Pierson v. Ray*, 386 U.S. 547, 557 (1967) (establishing qualified immunity from suit); *Everitt*, 156 N.H. at 209 (qualified immunity protects public officials and employees from personal liability under § 1983 for wrongful acts committed within the scope of their government employment). Under the doctrine of qualified immunity, “[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Snelling v. City of Claremont*, 155 N.H. 674, 684 (2007). Determining whether an official is entitled to qualified immunity is a question of law for the court. *Id.*

New Hampshire follows the First Circuit’s test to determine whether a public official is entitled to qualified immunity. *See id.* The test requires the court to determine: (1) whether the plaintiff has alleged a constitutional violation; (2) whether the right was “clearly established” at the time of the violation; and (3) whether a similarly situated reasonable official would have understood the constitutional right at issue. *Id.*, citing *Mihos v. Swift*, 358 F.3d 91, 102 (1st Cir. 2004). For the purposes of the instant analysis, the court will assume that the plaintiff has satisfied his burden under the first prong of the qualified immunity test—establishing a cognizable constitutional violation under the Fourth Amendment.

The second and third prongs of the qualified immunity test require the court to determine whether the right was clearly established and whether reasonable officers would have understood the right to be clearly established. “The operation of this standard ... depends upon the level of generality at which the relevant ‘legal rule’ is to be identified.” *Anderson*, 483 U.S. at 639. For

instance, at the most general level, the right to be free from arrest in the absence of probable cause is, without question, clearly established. "Much the same could be said of any other constitutional or statutory violation." *Id.* Nevertheless, "if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of [qualified immunity]." *Id.* (citation omitted). The test is, and must be, more particularized: in order to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*


In the present case, the question is whether a police officer's right to be free from restraint is sufficiently clear where the officer's supervisors suspect that he has violated a protective order and where the officer acts evasively and erratically in the supervisors' presence. The court concludes that the law is not sufficiently clear in these circumstances. As set forth in the court's sovereign immunity analysis, the officers had a reasonable basis to believe that their conduct was lawful under RSA 173-B:9, III and RSA 135-C. Captain Myrdek also had a rational basis for his concern about Ms. Conrad's safety. Courts consistently recognize the difficulties law enforcement officers face in "determining whether particular searches or seizures comport with the Fourth Amendment." *Anderson*, 483 U.S. at 644. This case is especially difficult in light of Captain Myrdek's concomitant and commingled roles of employer and law enforcement officer. Given this difficulty, Captain Myrdek is entitled to qualified immunity.

Because the plaintiff's right to be free from confinement under the circumstances was not clearly established, Captain Myrdek is entitled to qualified immunity on Count VI of the plaintiff's writ. Thus, the court need not reach the merits. Captain Myrdek is entitled to a directed verdict on Count VI.

Based on the foregoing, the court concludes that the NHDS is entitled to sovereign immunity and Captain Myrdek is entitled to official immunity on Count I (false imprisonment). Additionally, Captain Myrdek is entitled to qualified immunity on Count VI (violation of § 1983). Accordingly, the defendants' motion for a directed verdict is GRANTED. The court vacates the jury's verdict and directs a verdict for the defendants.

So ORDERED.

Date: July 2, 2012


LARRY M. SMUKLER
PRESIDING JUSTICE